NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN FREDERICK MENZENHAUER, Respondent, and OSCAR SCHMIDT, Appelant.	On Appeal.

BRIEF FOR APPELLANT.

The bill of the respondent in this suit alleges that the respondent and appellant formed a partnership between themselves for the manufacture of guitar-zithers in April, eighteen hundred and ninety-nine; that they were entitled, each, to one half the assets and profits of the business.

That the factory was in Jersey City, but the instruments were sold in the United States and Europe; the European headquarters being at Berlin: the respondant assuming charge of the business in Jersey City, the appellant in Berlin.

That the sale of the instruments in Europe was due in great measure to the use of a patented music sheet used in connection with them; for the use of which the firm was obliged to pay a large royalty to the patentee.

That reports of the condition of the business in

Europe were sent to the respondent by the appellant, from time to time, until about January, nineteen hundred, after which time he received no reports except a general statement that the business was very poor owing to strikes, and that the firm could not afford to pay any longer, the license demanded by the patentee of the music sheet for the further use of that invention.

In this condition of affairs, it is alleged the appellant came to America and proposed to the respondent to either purchase respondent's interest in the business, or sell his interest to respondent, declaring at the same time that the business was not sufficiently profitable for both to continue in it, and exhibiting to the respondent statements purporting to show the financial condition of the firm in Europe.

The respondent asserts that he relied on these representations of the defendant, and, on the seventh day of May, nineteen hundred, assigned his entire interest in the firm to the appellant for thirty thousand dollars, which the appellant paid to him.

The bill proceeds to allege further that these representations of the appellant respecting the condition of the business and the acquisition of the patent rights to the music sheet were materially untrue.

Upon these statements of fact the respondent asks that the assignment of his interest to tht appellant be rescinded, declared void, and be delivered up for cancellation, and that the appellant render an account of the partnership business.

The demurrer is founded upon the argument that the respondent is not entitled to be restored to the rights which he possessed at the time of the assignment until he has done all that he can to put the appellant in a similar position by returning to the appellant the money that he received from him in consideration of the assignment.

The bill declares that the assignment was fraudulently obtained and prays that it may be declared void and rescinded, but there cannot be a rescission of the contract as long as the respondent retains the profit that he derived under it. It would be inequitable for him to have the benefit of the original contract that he asks to have restored and also of the subsequent contract that he asks to have set aside. His position before the Court is inconsistent. He still retains all the rights that he derived from the contract that he repudiates.

Before asking the aid of this Court to rescind the contract of assignment, he must do all that is in his power to rescind it himself.

He cannot delay his rescission until ordered to do so by the Court because it is already in his power to rescind completely by voluntarily tendering back the money. The bill does not allege, even, that he is ready to return the money.

The assignment of the partnership interest was a sale in every sense of the word that a transfer of a chattel is a sale, and the law defining a vendor's right to rescind a contract of sale and his duties in respect to such rescission governs this case absolutely.

The proposition that a vendor, entitled to rescind a sale for fraud, must first make restoration, is elementary.

The decisions in New Jersey have so clearly declared the rights and duties of a party to a contract entitled to rescind for fraud, or failure in performance, that it is believed that no other decisions need be cited in support of the foregoing contentions.

The leading case in New Jersey is Byard v. Holmes (1868), 4 Vr., 119. It was an action for money had and received. The defendant had induced plaintiff to purchase shares in a company formed to exploit certain lands, and in return for his money the plaintiff obtain 150 shares of the company's stock. The ground of the action was certain fraudulent representations of the defendant as to the extent of land that the company owned. The Court said:

"Assuming that the plaintiff had a right to rescind, it remains to be considered whether there was evidence in the case to justify the jury in finding that he had, in fact, rescinded the original contract. On the argument in support of the verdict, it seemed to be taken for granted, that proving the contract fraudulent was the same thing as proving it utterly void, and therefore equivalent to proof of an actual rescission. But, as has been already shown, it is well settled that fraud does not, of itself, make a contract void, but only furnishes a legal ground for avoiding it, at the option of the injured party. And it appears to be equally well settled, that while it is true that a contract may be avoided for discovered fraud, although the fraud-doer cannot be put in *statu quo*, still so far as this can be done the other party is bound to do it, and to do it as soon as practicable after the discovery of the fraud; and that there can be no rescission so long as he retains anything received under the contract, which he might have returned, and the withholding of which might be injurious to the other party. Campbell v. Fleming, 1 Ad. & E. 40; Cook v. Gilman, 34 N. H. 556; Masson v. Bovet, 1 Denio, 69; Cushing v. Wyman, 38 Mi. 589; Evans v. Gale, 1 Foster, 240; Norton v. Young, 3 Greenl. 30; Sheppard v. Temper, 3 N. H. 455; Baker v. Robbins, 2 Denio 136; Meyer v. Shoemaker, 5 Barh. 319; Wheaton v. Baker, 14 Barb. 594; 2 Kent's Com. 480; 2 Parsons on Con. 680, note."

In the case of Doughton v. Camden Bldg. Loan (1886) 14 Stew. 556, the defendant had mortgaged to complainant certain premises, and had fallen behind in payment of taxes. In order to straighten his account, complainant agreed to cancel the existing mortgages upon receiving a new mortgage from defendant, and upon defendant's paying certain taxes and transferring certain stock. Defendant executed the new mortgage and assigned the stock, but delayed payment of the taxes for thirty days after the time appointed, after which complainant repudiated the transaction and commenced foreclosure upon the old mortgage. The Court found that defendant had made substantial compliance with the contract, and dismissed the bill upon the ground that, although the complainant was entitled to annul the contract for the defendant's failure to pay the taxes at the time specified, it had failed to exercise its right to annul, inasmuch as it still retained the consideration received under the contract which it had repudiated. The Court said:

"It is a well settled principle of law and equity that a party cannot rescind a contract by his own will, and at the same time keep possession of the consideration, in whole or in part, which he has received under it. So far as it is practicable, he must put the other party in *statu quo* before he can exercise his right of rescission. The rule is that there shall be 'prompt repudiation and restoration as far as possible.' Byard v. Holmes, 4 Vr. 119; Gay v. Altar, 102 U. S. 79; Hunt v. Silk, 5 East 449; Clough v. London & N. W. Ry. Co., L. R. (7 Ex.) 26, 37; Bwlch-y-Plwm Mining Co. v. Baynes, L. R. (2 Ex.) 324; Pollock's Principles of Contracts, 509; 2 Parsons Cont. 679."

In the case of Smallye v. Hendrickson (1862), 5 Dutch., 371, an action for the price of goods sold, the Court said:

"Where a vendee has a right to rescind a contract of sale, if the property has been delivered to him, he must return, or offer to return it, or give notice of rescission to the vendor, unless there is a stipulation which relieves the vendee from such obligation; and whether there has been such stipulation or not, is a question of fact to be decided by the jury."

Conlon v. Roemer (1889), 23 Vr., 53, was an action for the price of labor and materials. The defendant proved that the plaintiff had made fraudulent representations as an inducement to the making of the contract and the Court defined his remedies in the following language:

"It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it or he may affirm the bargain and sue for and recover damages for the fraud.

"If he elects the former course, he must not sleep upon his rights, but must move promptly. Central Bank v. Pindar, 46 Barb. 467; Hunt v. Silk, 5 East 249.

"And the party seeking to rescind must put the opposite party in *statu quo* so far as he is able to do it. Byard V. Holmes, 4 Vroom 119."

The suit of Henninger V. Heald (1894) 7 Dick. 431, affirmed 8 Dick. 694, was brought for the purpose of setting aside a sale of lands on the ground of fraud. In that case it was declared that "A party who asks for the rescission of a contract upon the ground of fraud, and still has the possession of that which he received under the contract at the time of the discovery of the fraud, is obliged to retain such possession that he may return it, or offer to return it *before or at the time of filing his bill.*" And in the opinion of the Court the following paragraph was quoted with approval: "A party demanding a rescission of a contract must return, or offer to return the consideration received by him. It is a settled principle in the courts of equity that relief will never be extended to a party against his own contract without exacting strict justice to his adversary."

We have been able to find no decisions in New Jersey qualifying or contradicting the principles stated in the foregoing cases.

In the opinion that accompanied the decision of the Court of Chancery no reference whatever was made to these cases because this suit was declared to be no more than an action for dissolution and accounting.

It is respectfully insisted that this view of the case ignores the important fact that a dissolution had been effected two years before the beginning of this suit by an agreement of *sale* under which one partner, in consideration of a round sum of money (without reference to an accounting) transferred and sold his interests to the other partner. Such a transaction is obviously different from ordinary dissolution. It was a sale in the strictest sense and the dissolution of the partnership was an incident of the sale. It was not the idea of the parties to this contract of sale that they should respectively withdraw from the firm assets such moneys and property as an accounting might show that they were entitled to, but the idea was that one of the partners should sell to the other his *interest* as an *entity* and no accounting was contemplated.

The consideration for the sale moving from the appellant was the payment of the firm debts and $30,000 to the respondent.

This contract of sale should be protected in the same manner as other sales are protected, and the respondent should not be permitted to rescind it until he has paid back the consideration which he received for it.

It is respectfullv submitted that the demurrer should have been sustained.

McDERMOTT & FISK.

Of Counsel with Appellant.

No. 77 Nov. Term 1902

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FREDERICK MENZENHAUER,
Respondent,

and

OSCAR SCHMIDT,
Appellant.

On Appeal.

RESPONDENT'S BRIEF.

The complainant alleges that he and the defendant entered into a partnership for the manufacture and sale of musical instruments, each having an equal interest in said business, and carried on the business in various places in the United States and Europe. That the defendant who had been conducting the business in Europe where most of the sales were made, and had knowledge of the assets of the concern there, fraudulently misrepresented the amount of such assets, and the condition of the business there to the complainant, and thus induced him to retire from the business, and accept for his interest therein the sum of Thirty Thousand Dollars ($30,000). The complainant after investigation ascertained that he had been defrauded by the defendant, that the representations made were false, and that the assets of the partnership were far in excess of what the defendant had represented. That instead of having an indebtedness equal to the amount of their cash on hand, as the defendant had represented, all of the debts of the partnership had been paid, and there was over One hundred and ten thousand (110,000) marks, in the European banks alone, to their credit, and the defendant had drawn large sums of partnership money from the banks, without the knowledge of the complainant, and had appropriated it to his own use. As soon as the complainant learned the facts in the matter, he called upon the defendant to account to him, but he refused and the complainant filed this bill of complaint for an accounting, and to have the assignment which he executed to the defendant of his interest in said business decreed void on account of fraud, and that said partnership be dissolved, and the defendant decreed to pay the complainant the amount which may be found to be due him upon the accounting. The defendant has possession of all the assets and books of account of the partnership.

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The defendant demurrs to the bill of complaint on the ground that the complainant did not return to the defendant the $30,000.00 received by him at the time of his retiring from the partnership. The defendant applies to this case the rule that the vendee cannot rescind a contract of sale for fraud until he has returned or offered to return to the vendor the goods purchased. That this rule is applicable in the ordinary case of a sale of chattels, there is no question.

The case before the court is not within the reason of that rule. In this case the complainant and defendant were the joint owners of a business including cash in bank and other property to the value of over two hundred thousand dollars; besides this the defendant had appropriated without the knowledge of the complainant a large amount of cash of the partnership to his own use.

By fraudulent representations as to the assets of the firm, and as to the condition of the business, the defendant induced the complainant to accept thirty thousand dollars which was less than one-third of what he was entitled to and retire from the business.

The rights of the defendant can be fully protected in the decree without the return of the $30,000.00 prior to the commencement of the suit by allowing him credit for that amount on the accounting.

The following cases are in point:

Allerton vs. Allerton, (50 N. Y. 670).

"The rule that he who seeks to rescind an "agreement upon the ground of fraud must place "the other party in as good situation as that in "which he was when the agreement was made, "is satisfied if the judgment asked for will accom-"plish the result, and in such case no offer to re-"turn that which was received is necessary."

"Accordingly, held, that where plaintiffs were "induced by the fraudulent representations of de-"fendant, their partner, to sell out their interest "in the partnership property for a sum paid in "cash, and where the complaint alleged and it ap-"peared that defendant had received more than "the amount paid out of the avails of the property, "and the judgment asked for was that defendant "account for the moneys received and pay over "the surplus after deducting the sum paid, that it "was not necessary to allege or show an offer to "return the money received on the sale."

In Pearce v. Wood, 3 Foster, N. H., 519.

"It was decided that if a person effect a compromise of his debts by fraudulent representations and procure a discharge of same by paying a per cent. thereon and an action be brought to recover the balance, on the ground of fraud, it is not necessary as preliminary to the right of recovery that the plaintiff repay or offer to repay the per cent. received by him, on the doctrine of recision of contracts does not apply to each case."

JAMES A. GORDON,
Counsel of Respondent.

NEW JERSEY

Court of Errors and Appeals

IN THE LAST RESORT IN ALL CAUSES.

BETWEEN

FREDERICK MENZENHAUER,
Respondent,

and

OSCAR SCHMIDT,
Appellant.

CASE ON APPEAL.

McDERMOTT & FISK,
Solicitors and Counsel of Appellant.

JAMES A. GORDON,
Solicitor and Counsel of Respondent.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

To the Honorable William J. Magie, Chanceller of the State of New Jersey:

Humbly complaining, showeth unto your Honor, your orator, Frederick Menzenhauer, of the city of Jersey City, County of Hudson and State of New Jersey:

That on or about the twenty-second day of April, eighteen hundred and ninety-nine, your orator entered into partnership with Oscar Schmidt for the manufacture and sale of guitar-zithers; by which partnership agreement said Schmidt and your orator each became entitled to one-half of the assets and profits of said business.

That the principal place of business of said partnership was in the city of Jersey City aforesaid, where the said firm had its factory and manufactured zithers, which were sold on the installment plan through agents in the United States and Europe.

That the sale of said instruments in Europe was greatly facilitated and increased by the use of a patent music sheet so arranged that by placing the sheet under the strings on the zither the notes on the music would come directly under the string to be touched, and in this manner the zither could be played mechanically by any person without much instruction. For the use of these patent music sheets said firm entered into a contract with the patentee whereby they paid to him a license fee of fifty thousand marks yearly for the right to use and sell said music sheets in Germany. And also paid a license fee of ten thousand marks yearly for the right to use said patent sheets in Austria and Hungary.

That the sale of instruments in Europe by said firm became very large, and from the time of the formation of said partnership until the seventh day of May, nineteen hundred, your orator remained at Jersey City attending to the business of said firm there where the goods were manufactured, and said Schmidt remained in Germany conducting the European business of said firm, the principal office of the firm in Europe being at Berlin, Germany, to which all of the agents of the firm in Europe made their returns.

That after the said Schmidt took charge of the business of the firm in Europe, statements showing the business done were sent from the main office in Berlin to your orator each month up to the month of January, nineteen hundred.

That after the first day of January, nineteen hundred, your orator received no statements of the business in Europe, but said Schmidt wrote to him that the business was very poor, that strikes had ruined the business entirely, and collections could not be made, and that they could not afford to pay the license fee for the patent music sheet, and that the owner of the patent would not accept any less than fifty thousand marks a year for a renewal of the license to use said sheets, without the use of which said business could not be carried on successfully.

That your orator arranged to sail for Europe on the eighth day of May, nineteen hundred, and the defendant hearing of this intention came from Berlin to Jersey City, where he arrived on or about the fifth day of May, nineteen hundred, and came directly to your orator and told him that the business did not pay any more, that it was running down, and that they could not afford to pay the high license for the use of the sheet music any longer, and that the license could not be gotten any cheaper than they had been paying for it; and that either your orator or he, the said Schmidt would have to withdraw from the business; that there, was not enough in it to pay both, and at the same time he showed to the complainant a statement in writing which he stated showed the amount of the moneys of the firm in the several banks in Europe and of the debts due in Europe by the firm. From this statement it appeared that the firm had to their credit in the banks in Europe the sum of eighty thousand marks, and that there were debts owing by them in Europe aggregating the same amount, so that the only assets of the firm were the factory property, the machinery and manufactured stock and the outstanding accounts and patent rights, which were then estimated to be worth in the aggregate sixty thousand dollars, and said Schmidt then insisted that your orator agree with him at once, before sailing for Europe, either to buy Schmidt's interest in said firm or sell to him your orator's interest therein.

And your orator further shows that relying on the truth of the said statements made and submitted by said Schmidt to your orator as to the money in bank, debts and cost of renewal of the license to use said patent music sheets he agreed with said Schmidt to sell to him all the right, title and interest of your orator in said partnership business for the sum of thirty thousand dollars, the said Schmidt to assume the liabilities of the company; and acting upon said representations and statements made by said Schmidt as to the condition of said partnership business in Europe, and as to the inability to procure the right to use said patented music sheets for less than fifty thousand marks yearly, your orator did on the seventh day of May, one thousand nine hundred, in consideration of the sum of thirty thousand dollars paid to him by said Schmidt, assign and transfer to him all the right, title and interest of your orator in the property and assets of said partnership business, including the factory, stock and outstanding accounts, patents, trade marks and copyrights pertaining to said business.

And your orator further shows that at the time said Schmidt made the representations to your orator that the right to the use of said patent sheet music could not be obtained for less than fifty thousand marks yearly, and when your orator assigned his interest in said zither business to Schmidt, said Schmidt had already procured an assurance and contract from the owner of said patent, assigning or agreeing to assign to said Schmidt the entire unexpired term in said patent music sheets, extended until the year nineteen hundred and six, for the sum of fifty thousand marks.

And your orator further shows that at the time said Schmidt represented to your orator that there were only eighty thousand marks in European banks to the credit of said firm, and that the indebtedness of the firm in Europe was eighty thousand marks, there were in fact over one hundred and ten thousand marks in European banks to their credit, and said firm had no indebtedness whatever in Europe, all of which was well known to said Schmidt, and said Schmidt had drawn large sums of money of said partnership from said banks without the knowledge of your orator, and appropriated the same to his own use.

And your orator charges that said Schmidt came to America from Berlin in the month of May nineteen hundred (after learning that your orator was about to sail for Europe) for the sole purpose of defrauding your orator, by procuring an assignment of his interest in said zither business by false and fraudulent representations for an inadequate consideration before he got to Europe, where he might ascertain the truth as to the license for the use of said patent music sheets, and as to the assets of the partnership and condition of the business in Europe.

And the defendant well knew that your orator relied upon the truth of the said statements and representations as a basis of the agreement which resulted in the said assignment of your orator's interest in said zither business to said defendant, and your orator insists that the said assignment is held by the defendant against equity and good conscience, and that the same ought to be regarded as null and void and of no effect whatever, and your orator of right is entitled to an equal division, not only of the said moneys in bank but also of all of the assets and income of said zither business rec·ived by said defendant or now in his possession, or in the possession of any one for him, and that your orator is entitled to an accounting as if said assignment had not been executed.

And your orator further shows that he did not learn that the defendant had misrepresented the condition of the business and the amount of the assets and liabilities of said zither business to him until about three months ago, since which time he has been diligently engaged in procuring evidence of the falsity of said representation, and that he has since demanded of the defendant an accounting as to the assets and income of said zither business, but said defendant has neglected and refused to comply with such demand, and your orator insists that upon a full and complete accounting between him and the said defendant under the direction of this Court with respect to said zither business, the defendant will be found largely indebted to your orator.

And your orator further shows that all of the books of account, papers and assets of said firm relating to said zither business are in the possession and under the control of the defendant and have been in his possession and control since the date of said assignment.

In tender consideration whereof and forasmuch as your orator is without adequate remedy at and by the strict rules of the common law and can only obtain such relief in this Court where matters of this nature are cognizable and relievable. To the end, therefore, that the said Oscar Schmidt may without oath (answer under oath being hereby waived) to the best of his knowledge, remembrance, information and belief, full, true and perfect answer make to and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and he distinctly interrogated thereto; and that the said assignment of your orator's interest in said zither business be declared null and void and be held for nought, and that the defendant be directed to surrender the same for cancellation, and that a full and complete account may be had under the order and direction of this Court, between your orator and the defendant in respect of the said partnership agreement, and that the defendant be decreed to pay to your orator the amount which may be found to be due him, and that said defendant may be decreed to make a full and complete discovery as to all matters herein set forth, and that said partnership be decreed to be dissolved, and that a receiver may be appointed of the property, rights and good will of said partnership, with power to dispose of the same, and to collect all outstanding accounts for the benefit of the parties interested therein, and to divide the same between the parties hereto according to their respective rights as determined by this Court. and that an injunction issue enjoining the defendant from disposing of or meddling with the said partnership property.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena issuing out of and under the seal of this honorable Court, to be directed to the said Oscar Schmidt, commanding him, by a certain day and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience. And your orator as in duty bound will ever pray, etc.

And your orator will ever pray, etc.

JAMES A. GORDON,
Solicitor and of Counsel with Complainant.

DEMURRER.

The demurrer of Oscar Schmidt, defendant, to the bill of complaint of Frederick Menzenhauer, complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained, to be true, in such manner and form as the same are therein set forth and alleged, does demur to said bill of complaint, and for cause of demurrer shows that it does not appear by the said bill of complaint that the said complainant has, at any time, tendered back to defendant the consideration, or any part thereof, received by him from the defendant, under the agreement of dissolution and the assignment and sale of his interests in the partnership business in the said bill mentioned, nor is any reason alleged in the said bill of complaint why said complainant has not made such tender; and this defendant further shows that said complainant is not entitled to have the said agreement of dissolution and the said assignment and sale of his partnership interest thereunder rescinded and set aside and declared null and void, and to have the relief prayed for in the said bill of complaint, unless it appears from the bill of complaint that he has made tender as hereinabove described, or unless by the said bill he has shown some reason for not making such tender, and for further cause in this behalf, the said defendant says that the said bill of complaint (in case the allegations therein contained are true, which this defendant does in no way admit) contains not any matter of equity whereon this Court can ground any decree, or give the complainant any relief or assistance as against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this honorable court whether he shall be compelled to make any futher or other answer to the said bill and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

McDERMOTT & FISK,

Solrs. Deft.

Affidavit of merits by defendant and proper certificate of counsel attached.

ORDER OVERRULING DEMURRER.

This cause coming on to be heard at the regular term of this Court, in the presence of James A. Gordon, of counsel with the complainant, and McDermott & Fisk, of counsel with the defendant, and the arguments of the counsel for the respective parties on the demurrer filed in the above stated cause having been heard:

It is, on this 3d day of June, nineteen hundred and two, on motion of James A. Gordon, of counsel with the complainant, ordered, that the said demurrer be overruled with costs, and that the defendant answer the complainant's bill within twenty days, and that if he fail so to do the complainant's bill be taken as confessed against him.

Respectfully advised

W. J. MAGIE,
C.

H. D. PITNEY,
V. C.

OPINION OF COURT BELOW.

The facts admitted by the demurrer are that in April, 1899, the complainant and defendant entered into a partnership for the manufacture and sale of certain musical instruments known as guitar-zithers. The manufacture of those instruments was carried on in Jersey City under the supervision of the complainant, and the sale of them was conducted by the defendant in different parts of the United States and Europe—principally in Europe; that to assist in the sale it was important to use a sort of patent music sheet which promoted a mechanical operation of the instruments, and the furnishing of these music sheets involved the payment of large fees to the patentee. That during the first year of the business, and while the defendant was conducting it in Europe, large sales were made and statements thereof sent to complainant up to the month of January, 1900. After that date the defendant wrote to the complainant that the business was very poor and had been ruined by strikes, and that the cost of the license fee paid to the patentees of the music sheets had, in connection with the strikes, substantially ruined it. That in May, 1900, complainant was about to leave for Europe to investigate the condition of affairs, when the defendant came from Europe to New Jersey to see complainant, and there informed him that the business was no longer profitable and that there was not enough in itto support both partners, and that one or the other must withdraw, and then furnished a statement of the business in which was stated the amount of money in banks in Europe and the amount of indebtedness there standing against the firm, showing the debits to be equal to the credits, and stating to the complainant that there were no assets in Europe, and that the only valuable asset was the factory property in Jersey City, which was estimated to be worth $60,000. Complainant relied upon the statements of the defendant, and then and there agreed to dissolve the partnership and sell his one-half of the business to the defendant for $30,000, which he did, and received the said sum of $30,000. Afterwards he learned that the statements of the defendant as to the condition of the business in Europe and the amount paid and necessary to be paid as license fees to the patentees of the music sheets were grossly inaccurate and false, and that there was a large surplus of assets in Europe, and that the license fees had been commuted and reduced to a comparatively small sum, and that the business, instead of being, as alleged by the defendant, unprofitable, was in a highly prosperous condition. That the complainant spent a year or two in investigating the affairs of the partnership, and as soon as he ascertained the true facts, called on the defendant to come to an accounting with him. The books, papers and all the assets of the firm are in the possession and under the control of the defendant.

The prayer is, first, that the assignment of complainant's interest in the zither business to the defendant be declared null and void; second, that the partnership may be decreed to be dissolved and a receiver appointed of the property, rights and good-will of the partnership; and, third, that a complete account may be taken under the order of the Court between the complainant and defendant of the partnership accounts, and the defendant decreed to pay complainant the amount which may be found due him.

The demurrer is based solely on the ground that the complainant in his bill does not offer to pay back to the defendant the $30,000 which he has received.

PITNEY, V. C.

I think the demurrer is based upon a wrong conception of the situation. The transaction sought to be annulled was not, strictly speaking, a sale of a chattel by the complainant to the defendant for which the complainant obtained a sum of money, and which chattle he seeks to recover back without returning the money which he received. The transaction was, in substance and effect, a dissolution of a partnership, in which the partnership, assets and good-will were turned over to one partner and the other was paid a consideration for his interest in the assets and business. It was a payment by the instaying partner to the outgoing partner of a sum of money as the value of his interest in the partnership. It was, in effect, an amicable dissolution of the partnership.

Now, the scope of the prayer of the bill is not that the partnership relation should be reinstated, but that the dissolution should be judicially declared, and an account taken of the partnership affairs and the interest of the complainant therein ascertained according to the practice of this Court, and the complainant paid that amount. The allegation, which for present purposes must be taken to be true, is that the amount of that interest is, and when judiciously ascertained will prove to be, much greater than the sum of $30,000 received by the complainant. In taking the account the complainant, of course, will be charged with so much money received by him from the defendant, and the defendant will be credited with that amount, unless he paid it out of partnership funds.

This view of the case shows its marked distinction from a case in which a fraud-doer conveys to the defrauded one an article of merchandise of little value, and by fraud and chicanery induces him to pay for it a sum greater than its value. In such a case the defrauded party cannot recover back his money from the fraud-doer without at the same time handing him back the article of merchandise which he received. He cannot receive the money and keep the object for which it was originally paid. But the principle applicable to such a case does not apply here.

If we seek for a parallel to the present case in the sale of a chattel we will more nearly find it in a case where the vender of the chattel by fraud is induced to part with it for a much less sum than its value, and seeks to recover not the chattel but the remainder of its value over and above the amount he has already received.

A short statement of the case is that the complainant is seeking the aid of this Court to ascertain the real value of his interest in the partnership at the time of the dissolution, and to compel the defendant to pay him the excess over and above what he has already received.

I will advise that the demurrer be overruled, upon the usual terms.

Notice of Appeal and Certificate of Counsel Filed and Served June 23, 1902.

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Oscar Schmidt, the appellant in the cause above named, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the third day of June, nineteen hundred and two, wherein your petitioner was defendant and the said Frederick Menzenhauer was complainant, in this respect, to wit, that the said order directs and adjudges that the demurrer filed by your petitioner be over-ruled, and that your petitioner pay to said complainant his costs of the said demurrer tc be taxed. And your petitioner humbly appeals from the said order of the Chancellor, on the ground that the same is erroneous for that the said demurrer should have been sustained.

Your petitioner therefore prays that the said order of the Chancellor may be reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

McDERMOTT & FISK,
Solicitors for and of Counsel with Appellant.

Answer to Petition of Appeal duly filed by James A. Gordon, Solicitor for Respondent.